FILED
AUG 3 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1164

In the

Supreme Court of the United States

JOHN R. SAND & GRAVEL COMPANY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether constitutional claims for just compensation under the Fifth Amendment are subject to sovereign immunity when the mandate of just compensation is self-executing.

2. Whether sovereign immunity is a legitimate basis for holding 28 U.S.C. § 2501 as jurisdictional.

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) submits this amicus curiae brief in support of Petitioner John R. Sand & Gravel.[1] The parties have consented to the filing of this amicus curiae brief.

Founded almost thirty-five years ago, PLF is the largest and most experienced public interest legal foundation of its kind. PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated as amicus or lead counsel in previous cases involving the Takings Clause of the Constitution. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005); *Palazollo v. Rhode Island*, 533 U.S. 606 (2001); *City of Monterey v. Del Monte Dunes at Monterey, Ltd.*, 526 U.S. 687 (1999); and *Nollan v. California Coastal Commission*, 483 U.S. 825 (1987). PLF believes that the proposed brief amicus curiae will help this Court ascertain the constitutional limits of sovereign immunity.

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity made a monetary contribution specifically for the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The Tucker Act, 28 U.S.C. § 1491(a)(1), provides the Court of Federal Claims with jurisdiction over takings claims brought against the United States. The statute of limitations applicable to suits in the Court of Federal Claims provides, in pertinent part:

> Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.

28 U.S.C. § 2501 (2000). The Federal Circuit issued a decision holding that Section 2501 constitutes a jurisdictional limit on the authority of the Court of Federal Claims. The court relied upon case law that filing within the statute of limitations period was a condition of the government's waiver of sovereign immunity in the Tucker Act and thus must be strictly construed. *John R. Sand & Gravel Co. v. United States*, 457 F.3d 1345, 1354 (Fed. Cir. 2006). By doing so in a case involving the Takings Clause of the Fifth Amendment, the Federal Circuit has wrongly applied the doctrine of sovereign immunity to constitutional claims for just compensation. The Takings Clause is a limitation of sovereign immunity. Sovereign immunity cannot defeat the solid command of the Fifth Amendment in the context of suits to enforce the "just compensation" guarantee.

The Federal Circuit's strict jurisdictional view of the statute of limitations for Petitioner's takings claim cannot be based on the doctrine of sovereign immunity. Receiving just compensation under the Fifth Amendment's Taking Clause does not require an explicit waiver of sovereign immunity because the Constitutional Framers waived immunity when they adopted the Fifth Amendment.

Only this Court can correct the Federal Circuit's ruling and, by so doing, preserve property owners' constitutional right to seek just compensation.

ARGUMENT

I

CONSTITUTIONAL CLAIMS FOR JUST COMPENSATION ARE NOT SUBJECT TO SOVEREIGN IMMUNITY

A. There Is No Sovereign Immunity from Fifth Amendment Takings Claims

The Federal Circuit held below that the statute of limitations in 28 U.S.C. § 2501 is a jurisdictional requirement for a suit in the Court of Federal Claims. *John R. Sand*, 457 F.3d at 1354 (citations omitted). In reaching its decision, the Federal Circuit relied on cases holding that statutes of limitations for causes of action against the United States are attached by Congress as a condition of the government's waiver of sovereign immunity and, as such, must be strictly construed. *John R. Sand & Gravel Co. v. United States*, 457 F.3d at 1354. The flaw in the Federal Circuit's holding is based on the premise that the government is categorically immune from suit for recovery of just compensation unless it consents to be sued. However, "[that] premise cannot withstand scrutiny, for the Just Compensation Clause of the Fifth Amendment works an abrogation of the government's immunity from suits resulting from takings of private property." Eric Grant, *A Revolutionary View of the Seventh Amendment and the Just Compensation Clause*, 91 Nw. U. L. Rev. 144 (1996) (noting the Supremacy of the Just Compensation Clause); *see also* Eric Berger, *The Collision of the Takings and Sovereign Immunity Doctrines*, 63 Wash. & Lee L. Rev. 493 (2006) (arguing that the Takings Clause trumps sovereign immunity).

Although it may be the general principle that the United States cannot be sued without its consent, this principle does not apply to suits directly authorized by the Constitution, including suits such as the one in this case to recover just compensation for private property taken by the United States. *See Arnberg v. United States*, 757 F.2d 971, 980 n.7 (9th Cir. 1984), *cert. denied*, 475 U.S. 1010 (1986) ("Actions brought under the taking clause of the fifth amendment are, of course, an exception to the rule that sovereign immunity is a bar to damages against the United States for direct constitutional violations."); *See Alder v. United States*, 785 F.2d 1004, 1009 (Fed. Cir. 1986) (stating Fifth Amendment does not require a specific waiver of sovereign immunity because the Constitution has already achieved that popular right); *T.O.F.C., Inc. v. United States*, 683 F.2d 389, 393 (Ct. Cl. 1982) ("[T]he fifth amendment is an express waiver of sovereign immunity."); *see also* Laurence H. Tribe, *American Constitutional Law*, Section 6-38, at 1272-73 (3d ed. 2000) ("A sovereign immunity defense . . . may not be available against a takings challenge, because the Court has suggested . . . that the Fifth Amendment's Takings Clause trumps state (as well as federal) sovereign immunity."); *Hughes Communications Galaxy, Inc. v. United States*, 26 Cl. Ct. 123, 145 (1992), *overruled on other grounds*, 998 F.2d 953 (Fed. Cir. 1993), *reh'g denied*, ("the taking of property by the sovereign for public use, though unquestionably an act of sovereignty, does not, under our Constitution leave the sovereign immune from having to pay compensation for the taking").

Indeed, this Court has recognized that the Court of Claims has jurisdiction over takings claims. *See United States v. Causby*, 328 U.S. 256, 267 (1946).

> If there is a taking, the claim is "founded upon the Constitution" and within the jurisdiction of the Court of Claims to hear and determine.

Id. at 1068-69 (citing *Hollister v. Benedict & Burnham Mfg. Co.*, 113 U.S. 59, 67 (1885)); *Hurley v. Kincaid*, 285 U.S. 95, 104 (1932); *Yearsley v. W. A. Ross Constr. Co.*, 309 U.S. 18, 21 (1940); *see also* 28 U.S.C. § 1491(a)(1) (2004) ("The United States Court of Federal Claims shall have jurisdiction to render judgment upon any claim against the United States founded [] upon the Constitution . . . ."). Because this case involves a takings claim, the jurisdiction of the Court of Claims was clear and should not have been raised *sua sponte*.

Property owners enjoy the right to bring takings claims not by the government's consent, but by constitutional mandate. The Fifth Amendment declares that "private property [shall not] be taken for public use, without just compensation." U.S. Const. amend. V, cl. 3. Through the Fifth Amendment, government has promised to pay just compensation if a taking has occurred. Since the plain language of the Fifth Amendment mandates just compensation for anything that amounts to a taking, no immunity from the obligation to provide compensation can be reconciled with the Fifth Amendment.

> It is a proposition too plain to be contested that the Just Compensation Clause of the Fifth Amendment is too "repugnant" to sovereign immunity and therefore abrogates the doctrine in suits brought in response to takings of private property by the United States. A taking without payment of just compensation is a constitutional oxymoron. Faced with proof that the government has effectuated such a condition, a court must do one of two things if it is to enforce the supreme law of the land. Either it must oust the government and restore the property owner to possession of his or her property, or it must confirm the taking and exact just compensation from the government. Between these alternatives, both of

> which abrogate sovereign immunity, there is no middle ground.

Grant, 91 Nw. U. L. Rev. at 200; *see also Andalex Resources, Inc. v. United States*, 54 Fed. Cl. 563, 568 (2002) (noting it is the "absolute and affirmative requirement" of the Takings Clause that fully waives sovereign immunity under the Takings Clause of the Fifth Amendment).

Sovereign immunity does not apply to a suit founded under the Just Compensation Clause of the Fifth Amendment.

B. The Just Compensation Clause of the Fifth Amendment Is Self-Executing

There is no sovereign immunity from the Taking Clause since it is self-executing and automatically strips the government of sovereign immunity. This Court has recognized the "self-executing" character of the constitutional provision with respect to compensation . . . ." *First English Evangelical Lutheran Church of Glendale v. County of L.A.*, 482 U.S. 304 (1987) (citing *United States v. Clarke*, 445 U.S. 253, 257 (1980)), (quoting 6 P. Nichols, *Eminent Domain* § 25.41 (3d rev. ed. 1972)); *see also* Paul J. Heald & Michael L. Wells, *Remedies for the Misappropriation of Intellectual Property by State and Municipal Governments Before and After* Seminole Tribe*: The Eleventh Amendment and Other Immunity Doctrines*, 55 Wash. & Lee L. Rev. 849, 871-72 (1988) (Just Compensation Clause creates an exception to normal sovereign immunity rules); Vicki C. Jackson, *Seductions of Coherence, State Sovereign Immunity and the Denationalization of Federal Law*, 31 Rutgers L.J. 691, 724 n.126 (2000) (Constitution provides direct remedy for takings in spite of sovereign immunity); and Grant, 91 Nw. U. L. Rev. at 201 (noting if remedy to compensation for taking is dictated by the Constitution itself, its availability cannot depend on the good graces of Congress.).

In *First English*, this Court explained that it had long recognized that claims for just compensation are grounded in the Constitution itself:

> The suits were based on the right to recover just compensation for property taken by the United States for public use in the exercise of its power of eminent domain. *That right was guaranteed by the Constitution.* The fact that condemnation proceedings were not instituted and that the right was asserted in suits by the owners did not change the essential nature of the claim. The form of the remedy did not qualify the right. It rested upon the Fifth Amendment. Statutory recognition was not necessary. A promise to pay was not necessary. Such a promise was implied because of the duty to pay imposed by the Amendment. *The suits were thus founded upon the Constitution of the United States.*

482 U.S. at 315 (emphasis in original) (citing *Jacobs v. United States*, 290 U.S. 13 (1933)); *see also United States v. Clarke*, 445 U.S. 253, 257 (1980) (describing the Takings Clause as "self-executing").

Notably, the Solicitor General of the United States filed an amicus brief in *First English* zealously attacking the above proposition on the basis of sovereign immunity. The Solicitor's Argument was that the Fifth Amendment was not a remedial provision. This argument was firmly rejected by this Court.

> The Solicitor General urges that the prohibitory nature of the Fifth Amendment, combined with principles of sovereign immunity, establishes that the Amendment itself is only a limitation on the power of the Government to act, not a remedial provision. The [inverse condemnation] cases cited in the text, we think, refute the argument of the United States

> that "the Constitution does not, of its own force, furnish a basis for a court to award money damages against the government." . . . Though arising in various factual and jurisdictional settings, these cases make clear that it is the Constitution that dictates the remedy for interference with property rights amounting to a taking.

482 U.S. at 316 n.9.

Because the Just Compensation Clause is self-executing, the Constitution itself provides the requisite waiver of sovereign immunity. *See Hair v. United States*, 350 F.3d 1253, 1257 (Fed. Cir. 2003) ("It is true that sovereign immunity does not protect the government from a Fifth Amendment Takings claim because the constitutional mandate is "self-executing."); *see also Cyprus Amax Coal Co. v. United States*, 205 F.3d 1369, 1374-75 (Fed. Cir. 2000), *cert. denied*, 532 U.S. 1065 (2001) (a self-executing clause of the constitution, such as the Takings Clause or the export clause, triggers the application of the Tucker Act's jurisdiction relating to claims founded under the constitution without the need to comply with other statutes); *Leistiko v. Secretary of Army*, 922 F. Supp. 66, 73 (N.D. Ohio 1996) ("The Just Compensation Clause, with its self-executing language, waives sovereign immunity because it can fairly be interpreted as mandating compensation by the government . . . .").

The constitutional rights of property owners to bring inverse condemnation actions such as the one in this case is summed up best as follows:

> [P]roperty owners enjoy the right to bring inverse condemnation actions not by the government's consent, but by constitutional command. The holding of *McElrath v. United States*—when a plaintiff avails himself of the "privilege" to sue the government, "he must do so subject to the conditions

> annexed by the government to the exercise of the privilege"—does not apply to suits for just compensation. It is constitutionally mandated that Congress open some court to hear claims against the United States founded upon the Just Compensation Clause; Congress cannot therefore require claimants who invoke the jurisdiction of such court to relinquish their constitutional rights.

Grant, 91 Nw. U. L. Rev. at 205.

The adoption of the Fifth Amendment by the Framers of the Constitution was an explicit waiver of sovereign immunity. The government cannot hide behind sovereign immunity to avoid payment of just compensation if a taking has occurred. If a taking has occurred, the Constitution unequivocally demands compensation.

II

SOVEREIGN IMMUNITY IS NOT A LEGITIMATE BASIS JUSTIFYING A STRICT STATUTE OF LIMITATIONS IN TAKINGS CASES

Because constitutional claims for just compensation are not subject to sovereign immunity, the Federal Circuit's sole reliance on sovereign immunity as the basis for its strict construction of the statute of limitations in 28 U.S.C. § 2501 as jurisdictional in this case cannot stand.

The Federal Circuit's decision rested entirely upon case law stating that "statute of limitations for causes of action against the United States, being conditions of the waiver of sovereign immunity, are jurisdictional in nature." *Martinez v. United States*, 333 F.3d 1295, 1316 (Fed. Cir. 2003) (en banc), *cert. denied*, 540 U.S. 1177 (2004); *see also Caguas Cent. Fed. Sav. Bank v. United States*, 215 F.3d 1304, 1310 (Fed. Cir. 2000), *cert. denied*, 531 U.S. 1070 (2001) ("In the Court of

Federal Claims, the statute of limitations is jurisdictional, because filing within the six-year period was a condition of the waiver of sovereign immunity in the Tucker Act, 28 U.S.C. § 1491(a)(1)."). However, none of the cases relied upon by the Federal Circuit (or the government in this case) involve takings claims under the Fifth Amendment. Thus, the issue of whether the government had conditioned the waiver of sovereign immunity on compliance with the applicable time deadlines was relevant in those previous decisions. In contrast, sovereign immunity has no bearing on claims brought under the Fifth Amendment. Thus, it should not be a basis for applying a strict construction of the statute of limitations in 28 U.S.C. § 2501.

In cases involving the Just Compensation Clause of the Fifth Amendment, 28 U.S.C. § 2501 does not create a jurisdictional condition when a takings claim is involved. It is merely a statute of limitations that can be waived by the parties as it was in this case by the government. *See Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 94 (1990) (statutes of limitations on suits against the government should be treated "in the same way" as statutes of limitations in private suits). As a statute of limitations, it should have been raised as a defense. *See, e.g.*, Rule of the Court of Federal Claims 8(c) (the statute of limitations is an affirmative defense).

> The raising of the statutory bar to a remedy does not, as such, deprive the court of jurisdiction to hear the cause in the first instance. Indeed, the court could not adjudicate the question of the proper application of the statute if it did not have subject matter jurisdiction over the claim.

Henke v. United States, 60 F.3d 795, 798 n.3 (Fed. Cir. 1995).

It is indisputable that the Court of Federal Claims had jurisdiction over the parties and the subject matter in this case since it involved a takings claim under the Fifth Amendment. *See Causby*, 328 U.S. at 267 ("If there is taking, the claim is

'founded upon the Constitution' and within the jurisdiction of the Court of Claims to hear and determine."); *see also* 28 U.S.C. § 1491(a)(1) (providing the Court of Federal Claims with jurisdiction over takings claims brought against the United States).

Since the statute of limitations in Section 2501 is not a jurisdictional requirement in this case, the Federal Circuit erred by considering the issue *sua sponte*.

CONCLUSION

By holding that sovereign immunity considerations warrant a strict view of the statute of limitations for Petitioner's taking claim, the court below has wrongly implied that claims under the Fifth Amendment are subject to sovereign immunity. Amicus respectfully urges the Court to reject the faulty premise that sovereign immunity supports a strict statute of limitations for Tucker Act claims arising under the Fifth Amendment and reverse the judgment of the Federal Circuit.

DATED: August, 2007.

Respectfully submitted,

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